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# The New Federal Rules of Civil Procedure [Part 1]

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# THE NEW FEDERAL RULES OF CIVIL PROCEDURE

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In his annual address to the American Law Institute on May 9, 1935, Chief Justice Hughes in these words well stated the objective:

> "It is manifest that the goal we seek is a simplified practice which will strip procedure of unnecessary forms, technicalities and distinctions, and permit the advance of causes to the decision of their merits within a minimum of procedural encumbrances. It is also apparent that in seeking that end we should not be fettered by being compelled to maintain the historic separation of the procedural systems of law and equity. . . . In the improvement we contemplate in the federal system we shall have the advantage of the simplicity and flexibility made possible by the exercise on the part of the Court of its rule-making power."[1]

The manifest desirability of that objective of course cannot be questioned.[2] It is indeed a "consummation devoutly to be wished." That that objective has been ably attained is now apparent from examination of the new Federal Rules of Civil Procedure,[3] which on December 20, 1937 were adopted by the Supreme Court of the United States.[4] On January 3, 1938 the Attorney General submitted the same to Congress, where they have been referred to the judiciary committees of the Senate and House.

Unless prevented by affirmative action of Congress, which is possible but very improbable, the rules will become effective three months subsequent to adjournment of the present session of Congress, but in no event prior to September 1, 1938. They will

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*Of the Yakima Bar. Author: *The Administration of Justice as Affected by Insecurity of Tenure*, 23 A. B. A. J. 930 (Ross A. B. A. Award, 1937).

[1] 79 L. ed. 1720; 19 JOUR. AM. JUD. SOC. 7 (June, 1935).

[2] "In some instances the practice is archaic and cumbersome, and still enforces the technical intricacies and refinements that prevailed in England in the 17th and 18th centuries, but have long been abandoned in the land that gave them birth." REP. U. S. ATT'Y GEN. (1937) 4.

[3] This is the correct designation as stated in Rule 85. They will be referred to herein for brevity merely as the rules. The rules are published in 82 L ed. Adv. Op. No. 8, Jan. 31, 1938; U. S. Law Week, Jan. 4, 1938. (Copies of the rules (H. Doc. 460) may be secured from the Superintendent of Public Documents, Washington, D. C., for 15c a copy).

[4] All of the justices concurred except Justice Brandeis. The reasons for his dissent were not published. Before his appointment he was a member of the A. B. A. Shelton Committee sponsoring this improvement.

govern all proceedings in actions thereafter commenced, and also further proceedings in actions then pending, "except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies."[5]

The rules "shall be construed to secure the just, speedy and inexpensive determination of every action."[6] They govern the procedure in the district courts of the United States, and also to a considerable extent appellate procedure, in all suits of a civil nature,[7] both at law and in equity, including actions removed from the state courts, except that they are not applicable to admiralty, bankruptcy,[8] eminent domain,[9] and certain other special proceedings.[10] The rules are not to be construed to extend or limit jurisdiction or venue, nor to affect substantive rights, nor to impair the constitutional right of jury trial.[11]

It is impossible, without unduly extending the length of this article, to discuss in detail each paragraph of the new rules, but it is our purpose: (1) briefly to survey the historical background; (2) to discuss the principal changes effected in federal procedure through adoption of these rules, and the principal points of similarity and difference between the new federal procedure and our state procedure in Washington; and (3) to consider possible improvements in our state practice which might be adopted therefrom.

## I.

Federal procedure at the present time is, of course, primarily governed in law actions by the Conformity Act[12] of 1872 and various other federal statutes and decisions, and in equity suits by the federal equity rules adopted by the Supreme Court of the United States in 1912 pursuant to act of Congress.[13] The adoption of these rules marks the successful culmination of the great movement instituted by the American Bar Association a quarter century ago in 1912, the same year in which the equity rules were adopted. Until his death in 1930 Thomas W. Shelton of Virginia

[5]Rule 86.
[6]Rule 1.
[7]See also, *Rules of Practice and Procedure After Plea of Guilty, Verdict or Finding of Guilt, in Criminal Cases*, adopted by the U. S. Supreme Court in 1934. 28 U. S. C. A. § 723a; 292 U. S. 661.
[8]"Except insofar as they may be made applicable thereto by rules promulgated by the Supreme Court."
[9]Except as to appeals.
[10]Rules 1 and 81.
[11]Rule 82 and the Enabling Act.
[12]28 U. S. C. A. § 724.
[13]28 U. S. C. A. § 723.

was the able chairman of the committee of that association which diligently advocated the enactment by Congress of legislation granting the Supreme Court the power to make such rules.[14] At first this was sought only as to law actions, but in 1922, under the leadership of Chief Justice Taft, the movement was expanded to cover this improvement as to both law and equity practice and an elimination of the procedural distinctions between them.[15]

Strange as it may seem, the principal opponent of this measure for many years was the distinguished Senator Thomas J. Walsh of Montana. It is an interesting paradox that the credit for finally procuring this enactment by Congress is due to Attorney General Homer S. Cummings, who was appointed to that office in 1933 following the sudden death of his predecessor, Mr. Walsh.[16]

The Act of June 19, 1934, pursuant to which these rules have been adopted, covers both law and equity actions, and provides as follows:

> "Be it enacted . . . That the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.
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> Sec. 2 The court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both: Provided, however, That in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate. Such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session."[17]

In 1935 the Supreme Court through Chief Justice Hughes made

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[14]24 A. B. A. J. 97 (Feb. 1938). See for example the able report of the Committee on Uniform Judicial Procedure. 53 A. B. A. REP. 138, 500 (1928).

[15]47 A. B. A. Rep 260 (1922). Chief Justice Hughes in the same address hereinabove quoted also said: "While such a division is readily explained as a matter of historical development, it cannot be justified as an objective in procedural reform." 79 L. ed. 1720.

[16]Clark, *The Challenge for a New Federal Civil Procedure*, 19 JOUR. AM. JUD. SOC. 10 (June, 1935).

[17]Act of June 19, 1934, c. 651, §§ 1, 2 (48 Stat. 1064), 28 U. S. C. A., §§ 723b, 723c.

the welcome announcement that the new rules would have the broader scope authorized by § 2 of the Act and would regulate both law and equity procedure.[18] The Court appointed a distinguished Advisory Committee of fourteen members, consisting of five law school professors and nine eminent attorneys, including former Attorney General William D. Mitchell of New York City as chairman, and George Donworth of Seattle.[19] Dean Charles E. Clark of Yale Law School, a recognized authority on pleading and procedure, was appointed a member and the reporter for the committee. Subordinate advisory committees were appointed in each state, including Mr. Albert's committee in Washington, which rendered able assistance.

History has never seen a greater cooperative effort of the bench and bar of a nation for the improvement of judicial procedure than that which we have witnessed in this country during the past three years.[20] The Preliminary Draft of the proposed rules was published by the Advisory Committee with the consent of the Supreme Court in May, 1936. After interminable discussion and countless suggestions from all parts of the nation a complete revision of the rules was published in April, 1937, and the final report of the Advisory Committee containing many further changes was published in November, 1937. Some further revision was made by the Supreme Court, although the rules as finally adopted substantially follow those finally proposed by the Advisory Committee.

The Supreme Court in its order expressing appreciation for the services of the Advisory Committee rightly refers to the task as "the formulation of a system of rules designed to promote the simplification of procedure in the federal courts, and thus to increase the efficiency of the administration of justice."[21]

## II.

There are two principal fundamental improvements effected by the adoption of the new rules, each of which is both highly desirable and of far-reaching importance.[22] These are, of course, in addition to the obvious recognition of the salutary principle that rules of pleading and practice should be made by the courts and not by statute. The first is the elimination of the distinction between the pleading and procedural systems of law and equity. This distinction is purely historical in character. It was eliminated

[18] 295 U. S. 774.
[19] 295 U. S. 774 (1935).
[20] Tolman, 61 A. B. A. REP. 436 (1936); 23 A. B. A. J. 971 (Dec. 1937).
[21] 24 A. B. A. J. 99 (Feb. 1938).
[22] Clark, *The Proposed Federal Rules of Civil Procedure*, 22 A. B. A. J. 447 (July, 1936).

as to state court procedure by the Field Code in New York in 1848 and thereafter in most of the other states, including Washington.[23] A continuation of the distinction in federal procedure would be wholly unjustifiable. Consequently rule 2 wisely provides that hereafter "there shall be one form of action to be known as 'civil action'." "These rules now offer a single and uniform method of procedure, free from arbitrary and artificial distinctions, which have long been productive of delay, uncertainty and expense."[24]

The second fundamental change is the substitution of the principle of uniformity for that of conformity—the substitution of a simple uniform system in all of the federal courts, alike in every state, in law as well as equity actions, instead of the old so-called Conformity Act of 1872. As is well known, the latter provided that in law actions in the federal courts procedure should conform "as near as may be" with the fluctuating procedural statutes of the state in which the federal court is held.[25] Although possessing certain theoretical attractiveness, this act has not worked well in practice. Every lawyer knows that by reason of other federal statutes and decisions, federal procedure in law actions has been far different from the state court procedure in numerous respects. The Conformity Act experiment has been a complete failure.

> "Fifty-odd notable exceptions to conformity have created a new and distinct body of unrelated procedure known as 'federal practice'. To the average lawyer it is Sanskrit; to the experienced federal practitioner it is a monopoly; to the author of text-books on federal practice it is a golden harvest."[26]

The principal argument of the opponents of this Enabling Act through the years was that it would throw additional burden upon the bar of learning two procedural systems, state and federal, rather than merely one. Of course, not only was that a flimsy excuse for obstructing such an improvement for the public good, but in truth and in fact we did not have actual conformity under the Conformity Act. Moreover—and this we wish to emphasize—it is now readily apparent that in a state such as Washington having a highly intelligent and advanced state court procedure, there will be in fact greater conformity under the new rules than under the old Conformity Act.

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[23] REM. REV. STAT. §§ 153, 255.

[24] 24 A. B. A. J. 132 (Feb. 1938).

[25] 28 U. S. C. A. § 724. For an excellent discussion of the conformity idea see Mr. Tolman's article, 23 A. B. A. J. 971 (Dec. 1937).

[26] Report of A. B. A. Committee on Uniform Judicial Procedure, 53 A. B. A. REP. 500, 509 (1928). Compare Clark, *The Proposed Federal Rules of Civil Procedure*, 22 A. B. A. J. 447 (July, 1936) and 18 JOUR. AM. JUD. SOC. 135 (Feb. 1935); Tolman, *The Conformity Idea*, 23 A. B. A. J. 971 (Dec. 1937).

The latter statement we believe will be evident as we proceed, although the differences as well as the similarities between our state procedure and the federal rules will be emphasized herein. Although procedure under the new rules differs in several important respects from the state court procedure in Washington, nevertheless in most respects there is a striking similarity between them—and much more so than under the former federal procedure.[27] Undoubtedly procedure in Washington, which was most ably represented on the Advisory Committee, was carefully studied by that Committee and was substantially followed in many important respects.[28] It may be noted that the Advisory Committee announced that every feature of the new rules is in actual practice in one or more states.[29]

In Washington, therefore, it is especially true that:

> "The new uniform rules are a first step toward a real and workable conformity. They are a composite of the best features of state practice. In at least thirty states the local practitioner can conduct litigation in federal court under those rules without finding many substantial departures from the method to which he is accustomed in the courts of his own state."[30]

A third important feature of the new rules is the extreme liberality as to joinder of parties and claims, as will be hereinafter noted, to the end that the entire controversy may be adjudicated in the one action.

The new federal rules are 86 in number and are divided into eleven groups or chapters.[31]

Coming now to a consideration of their more important pro-

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[27]"The one single system envisaged by the rules will not seem greatly different from the procedure of most, if not all, of the states, but will appear as it is, merely the logical extension of already exisiting state practice systems." Clark, *The Proposed Federal Rules of Civil Procedure*, 22 A. B. A. J. 447 (July, 1936).

[28]This is shown by the rules as adopted and by the frequent citations of the Washington statutes and rules in the notes to the reports of the Advisory Committee.

[29]24 A. B. A. J. 98 (Feb. 1938); 61 A. B. A. REP. 423, (1936).

[30]24 A. B. A. J. 132 (Feb. 1938).

[31]For excellent discussions of the proposed rules by members of the Advisory Committee and others before the 1936 and 1937 American Bar Association conventions, see: 61 A. B. A. REP. 86 to 119, 423 to 496 (1936); 22 A.B. A. J. 780 *et seq.* (Nov. 1936); 23 A. B. A. J. 965 to 978 (Dec. 1937). See also, Hammond, *Some Changes in the Preliminary Draft of Proposed Federal Rules of Civil Procedure*, 23 A. B. A. J. 629 (Aug. 1937); Clark, *The Proposed Federal Rules of Civil Procedure*, 22 A. B. A. J. 447 (July, 1936); Clark and Moore, *A New Federal Civil Procedure—the Background*, 44 YALE L. J. 387, 1291 (1935).

For a complete bibliography of this general subject see 62 A. B. A. REP. 705 (1937), and also pages 91 to 95 of the *Notes to the Rules of Civil Procedure for the District Courts of the United States*, just published (March, 1938) under the direction of the Advisory Committee.

visions, among the more obvious highly desirable improvements is the abolition of the technicalities pertaining to terms of court, the powers of the court being no longer affected by the expiration of a term of court.[32] Also eliminated is the absurd necessity of taking exceptions to adverse rulings of the court during a trial (save as to instructions to juries) in order to have the right to predicate error thereon in the event of an appeal.[33]

*Commencement of Actions*

As to the method of commencing an action, the rules adhere to the present federal practice and differ substantially from our state court procedure. Rule 3 provides that "a civil action is commenced by filing a complaint with the court."[34] The clerk then forthwith issues the summons and delivers it for service to the marshal or person specially appointed for that purpose. With it is served copy of the complaint furnished by the plaintiff. All process other than subpoenas may be served anywhere within the state in which the court is held, and "when a statute of the United States so provides, beyond the territorial limits of that state." (Rule 4).

The preliminary draft by the Advisory Committee submitted alternative rules in this respect, and there was a direct conflict of opinion among the committee members. It is believed that it would have been much preferable if our more informal state practice had been adhered to, but this rule was finally adopted by the Advisory Committee and the Supreme Court in response to an overwhelming reaction from the legal profession throughout the country in favor of the more formal method.[35]

The next rule, on the other hand, is very informal in providing that service of pleadings subsequent to the original complaint, motions, etc., upon an attorney may be made by delivering a copy to him or leaving the same at his office with his clerk or other person in charge thereof, "or by mailing it to him at his last known address. . . . Service by mail is complete upon mailing." (Rule 5(b)).[36]

In any action in which there are unusually large numbers of

[32]Rules 6 (c) and 77.

[33]Rule 46. Compare REM. REV. STAT. §§ 382, 385.

[34]In view of this provision undoubtedly the period of the statute of limitations is to be determined as of the date of filing the complaint, as under our state practice. REM. REV. STAT. § 167; 23 A. B. A. J. 967 (Dec. 1937).

[35]23 A. B. A. J. 967 (Dec. 1937); Hammond, *Some Changes in the Preliminary Draft of the Proposed Federal Rules of Civil Procedure*, 23 A. B. A. J. 629 (Aug. 1937); Report Advisory Committee p. 5 (April, 1937).

[36]In cases where opposing counsel reside in the same city or town this is very informal, but undoubtedly convenient.

defendants, the court may by order dispense with service of the pleadings of the defendants and replies thereto as between the defendants; any cross-claim or affirmative defense being deemed denied or avoided; provided the same is filed and served upon the plaintiff and a copy of such order is served upon all parties as directed by the court.[37]

All papers after the complaint required to be served upon a party are to be filed with the clerk of the court either before service or within a reasonable time thereafter. (Rule 5(d)). Notice of hearing of motions must be served at least five days in advance.[38] In the event of service by mail three days must be added to the prescribed period, making a total of eight days. (Rule 6(d) and (e)).

*Pleadings and Motions*

The rules differ from the Washington state practice in another important respect in that, as under federal equity rule 31, unless ordered by the court, there is a reply only if the answer contains a counterclaim denominated as such. (Rule 7). Allegations by way of affirmative defense are deemed denied or avoided without reply. (Rule 8(d)).

In this respect we believe that the Washington state procedure under the code is much superior. As well stated by Judge Fee of Oregon, there is danger of "out-liberaling the liberals."[39] There is danger of a litigant and his counsel being surprised at the trial as to the issues presented, which is not always conducive to justice, especially from the standpoint of the "surprisee."[40]

A complaint or other pleading setting forth a claim for relief must contain:

> "(1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it. (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative, or of several different types may be demanded."[41]

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[37]Rule 5 (c). In certain actions such as lien or water right cases such a practice is decidedly convenient.

[38]Unless otherwise ordered by the court, which may be done *ex parte* for cause shown.

[39]61 A. B. A. REP. 93 (1936). The rule as then proposed was later substantially modified.

[40]For example, if an answer affirmatively pleads a release, certainly the defendant is entitled to know before the trial upon what ground, if any, the plaintiff contends that the release is not binding.

[41]Rule 8 (a). As to pleading in the alternative, compare Church v. Brown, 150 Wash. 178, 272 Pac. 511 (1928).

It will be noted that the second requirement pertains to a "short and plain statement of the claim showing that the pleader is entitled to relief", rather than "statement of the facts", as required by the code of procedure in Washington and other states.[42] Attached to the rules is an "Appendix of Forms" prepared by the Advisory Committee as part of its final report and adopted by the Supreme Court.[43]

Rule 84 states that the same "are intended to indicate, subject to the provisions of these rules, the simplicity and brevity of statement which the rules contemplate."[44]

Most of the proposed forms are exceedingly short and general in their allegations.[45] This is undoubtedly very desirable, so long as it is not carried too far. We believe a word of warning should be expressed, however, as it is easy for counsel to be misled by these proposed forms. It is believed that they are suggested as covering an exceedingly simple factual situation and that, as is true in most cases, where the facts are more involved, the same should be pleaded at greater length and with greater particularity. In order that the defendant and his counsel may be fairly apprised before the trial precisely what he is charged with, certainly more should be required than a mere statement in vague general terms of the nature of the action and the amount sued for. Here again there is danger of "out-liberaling the liberals."

That this is the proper construction of the rules and that which will be applied by the federal courts is, we believe, indicated by rule 12(e) which provides:

> "A party may move for a more definite statement or for a bill of particulars of any matter which is not averred with sufficient definiteness or particularity to enable him properly to prepare his responsive pleading or to prepare for trial. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the

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[42]REM. REV. STAT. § 258; Equity Rule 25. This departure from the provision of the state code was intentional on the part of the Advisory Committee. See Clark, *The Proposed Federal Rules of Civil Procedure*, 22 A. B. A. J. 447, 450 (July, 1936).

[43]This final report was presented in November, 1937, and there was no opportunity for public criticism as to the appendix of forms therein contained.

"The Advisory Committee appended a note thereto in their final report changing the language of that rule and stating that the same "is to make it clear that the rules control the forms and that the forms do not supersede the rules." Final Report of Advisory Committee p. 56 (Nov. 1937). The former provision was that the said forms "shall be considered sufficient under these rules." Report of Advisory Committee p. 215 (April, 1937).

[45]For examples of the complaint see forms 3 to 17 inclusive.

court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just. A bill of particulars becomes a part of the pleading which it supplements."[46]

In other words, construing rules 8(a) and 12(e) together, in order to give effect to each, in accordance with well established rules of construction, it seems clear that the "short and plain statement of the claim showing that the pleader is entitled to relief" must also, in order to survive attack by motion, state the facts "with sufficient definiteness and particularity to enable him (the adverse party) properly to prepare his responsive pleading or (and) to prepare for trial."

With reference to defenses rule 8(b) requires that "a party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies." Denials may be for want of knowledge or information sufficient to form a belief as to the truth of an averment, and this has the effect of a denial.

Rule 8(c) lists a considerable number of affirmative defenses,[47] and provides that the answer should affirmatively plead any of them "and any other matter constituting an avoidance or affirmative defense." Failure to deny constitutes an admission, except as to the amount of damages, and except where no responsive pleading is required or permitted. (Rule 8(d)).

The rules contain these commendable provisions:

"Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required." (Rule 8(e)(1)).

"All pleadings shall be so construed as to do substantial justice." (Rule 8(f)).

Rule 8(e)(2) permits pleading "two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses." The pleading is not rendered insufficient so long as one of the statements in the alternative if made independently would be sufficient, even though others are insufficient. "A party may also state as many separate claims or defenses as he has, regardless of consistency,[48] and whether based on legal or equitable grounds or on both."[49]

[46]In Washington a bill of particulars is not part of the pleadings. Dudley v. Duval, 29 Wash. 528, 70 Pac. 68 (1902); Nilsen v. Ebey Land Co., 90 Wash. 295, 155 Pac. 1036 (1916).

[47]One of these is "injury by fellow servant." Evidently the Supreme Court of the United States still recognizes the existence of the fellow servant rule. But see Buss v. Wachsmith, 190 Wash. 673, 70 P. (2d) 417, adhered to *en banc*, 93 Wash. Dec. 201 (1937).

[48]This is contrary to the rule in Washington. Seattle National Bank v. Carter, 13 Wash. 281, 43 Pac. 331 (1895).

[49]Compare REM. REV. STAT. § 273.

Except to the extent required to show the court's jurisdiction, it is unnecessary to allege the capacity of a party to sue or be sued, or authority to sue or be sued in a representative capacity, or the legal existence of an organized association of persons. If there is any issue thereon, it must be raised by specific negative averments of the adverse party. (Rule 9.) It is further provided that in all averments of fraud or mistake the circumstances shall be stated with particularity, although malice, intent, knowledge and other condition of mind may be averred generally. It is also sufficient to aver generally that all conditions precedent have been performed; and if this is denied the same must be denied specifically and with particularity.[50] Items of special damage must be specifically stated.

Rule 11 abolishes the absurd rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses, or of one witness sustained by corroborating circumstances. The new rules adhere to the practice under equity rule 24, rather than the state practice, in eliminating verification of pleadings and substituting therefor the requirement that every pleading shall be signed by at least one attorney of record in his individual name.[51] Such signature constitutes a certificate by the attorney that he has read the pleading, that to the best of his knowledge, information and belief there is good ground to support it, and that it is not interposed for delay. For a willful violation of this rule an attorney "may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted."[52]

The period for appearing after service of summons and complaint within the state continues to be twenty days, except as to the United States or an officer or agency thereof, as to whom it is sixty days. (Rule 12(a)).

Demurrers are abolished, and there is substituted therefor a *motion to dismiss*, as under the equity rules.[53] The suggested language in form 19 appended to the rules is:

> "The defendant moves the court to dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted."

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[50]Rule 9. Compare REM. REV. STAT. § 288.

[51]Or by the party if not represented by counsel.

[52]While opinions may differ, we submit that while placing such responsibility upon the attorney may not be particularly objectionable, there is much more reason for placing responsibility upon the party who knows the facts, by retaining the requirement of verification of pleadings.

[53]Rules 7 (c) and 12 (b); form 19. Compare equity rule 29.

A similar allegation may be made as an affirmative defense in an answer. (Form 20).

Every defense, in law or fact, to a claim for relief in any pleading must be asserted in the responsive pleading thereto if one is required, "except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief." (Rule 12(b)).

After the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings. (Rule 12(c)). This is apparently an appropriate method for testing the sufficiency of the allegations of an affirmative defense in an answer.[54]

Defenses upon any of the six grounds referred to in rule 12(b) hereinabove quoted, whether made in a pleading or by motion, and a motion for judgment on the pleadings, must be heard and determined before trial on application of any party, unless otherwise ordered by the court. (Rule 12(d)).

The rules also permit motions for a more definite statement or for a bill of particulars, hereinabove referred to, and motions to strike. (Rules 12(e) and (f)). As under the state practice, all defenses are waived which are not presented either by motion or by answer or reply except (1) failure to state a claim or defense, and (2) lack of jurisdiction of the subject matter. (Rule 12(h)).

Repleading in an action removed from the state court is unnecessary unless the court so orders. In such action if the defendant has not answered, he must answer or present available defenses or objections within the time allowed for answer by the state law or within five days after the filing of the transcript of the record in federal court, whichever period is longer. (Rule 81(c)).

[54]While it is difficult to see any advantage in abolishing demurrers, nevertheless the same result may be reached under the new rules under another name. Fortunately the new rules do not adopt the absurd doctrine followed in this state as to motions for judgment on the pleadings. See State v. Vinther, 183 Wash. 350, 48 P. (2d) 915, 186 Wash. 691, 58 P. (2d) 357 (1935).

Counterclaims are of two kinds, compulsory and permissive. A pleading must state as a counterclaim "any claim, not the subject of a pending action, which at the time of filing the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction." (Rule 13(a)).

A pleading *may* state as a counterclaim "any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim." (Rule 13(b)).

A counterclaim may claim relief "exceeding in amount or different in kind" from that sought by the adversary, and it may or may not diminish or defeat a recovery sought by the latter.[55]

A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant. (Rule 13(g)).

When the presence of additional parties within the jurisdiction is required for the granting of complete relief in the determination of a counterclaim or cross-claim, the court shall order them brought in, if possible without depriving the court of jurisdiction.[56]

Rule 14 introduces a new third-party practice.[57] Before the service of his answer a defendant may move *ex parte,* or after service of the answer, on notice to the plaintiff, for relief as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action, who is or may be liable to him or to the plaintiff for all or part of the plaintiff's claim against him. If the motion is granted, such additional party so served is called a third-party defendant and may assert his defenses against the plaintiff, the third-party plaintiff (original defendant), or any other party. The third-party defendant is bound by the adjudication of the third-party plaintiff's liability to the plaintiff, as well as of his own liability to the plaintiff or to the third-party

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[55]Rule 13 (c). These provisions are not applicable as against the United States or an officer or agency thereof.

[56]Rule 13 (h). Compare REM. REV. STAT. § 308-2.

[57]See form 22; Notes to Rules of Civil Procedure, p. 17 (March, 1938); Report of Advisory Committee, p. 41 (April, 1937).

plaintiff. A third-party defendant may proceed likewise by adding a new third-party defendant.[58]

With reference to amendments, the rules are extremely liberal. As under our state practice, a party may amend his pleadings once as a matter of course at any time before a responsive pleading is served, otherwise only by leave of court or by written consent of the adverse party.[59] Such "leave shall be freely given when justice so requires." If the pleading is one to which no responsive pleading is permitted, and the action has not been placed upon the trial calendar, it may be amended without leave of court at any time within twenty days after it is served.

When issues not raised by the pleadings are tried "by express or implied consent of the parties", they are to be treated in all respects as raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion at any time, even after judgment. Failure so to amend, however, does not affect the result of the trial of such issues. If evidence is objected to at the trial as not within the issues, the court may permit amendments, and "shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits." A continuance may be granted to enable the other party to meet such evidence. The court may permit a supplemental pleading setting forth the occurrences since the original pleading. (Rule 15(b) (c) and (d)).

Rule 16 provides for pre-trial procedure in the discretion of the court—an interesting experiment which is advocated by numerous authorities on procedure and which has been found quite successful in England and several larger cities with congested trial calendars, notably Detroit and Boston. The court may, in its discretion, direct all attorneys to appear before it for a conference to consider: simplification of the issues, amendments to the pleadings, possibility of obtaining admissions, limitation of number of expert witnesses, advisibility of preliminary reference to a master for findings to be used as evidence before the jury, and all other matters which might expedite disposition of the case. The court makes an order as to the action taken at the conference, thereby limiting the issues to be disposed of at the trial. Such order controls the subsequent course of the action, "unless modi-

[58]At this point one may have doubts about the simplification of procedure, but in practice it is not likely that it would be as confusing as it sounds.

[59]Rule 15 (a). Compare REM. REV. STAT. § 308-3.

fied at the trial to prevent manifest injustice." Pre-trial hearings may be ordered in special cases or in the discretion of the court by general order establishing a pre-trial calendar as to all actions, jury actions, or non-jury actions.[60]

*Parties*

Rule 17 contains provisions as to parties substantially the same as under our state code. Every action must be prosecuted in the name of the real party in interest, subject to the usual exceptions.[61]

The plaintiff in his complaint or in "a reply setting forth a counterclaim" and the defendant in an answer containing a counterclaim, "may join, either as independent or as alternate claims, as many claims either legal or equitable or both as he may have." Subject to the requirements of certain other rules, there may be a like *joinder of claims* when there are multiple parties and a like joinder of cross-claims or third-party claims.[62]

Another excellent provision, conducive to avoiding a multiplicity of suits and to determination of an entire controversy, is that, without altering the substantive rights of the parties, two claims may be joined in a single action which formerly could be prosecuted only consecutively.[63] In particular, a plaintiff may state a claim for money and a claim to have set aside a fraudulent conveyance, without first obtaining a judgment establishing the money claim.[64]

Persons having a joint interest must be made parties if subject to the jurisdiction of the court and if possible without depriving

[60]For excellent discussions of this subject see, Notes to Rules of Civil Procedure p. 16 (March, 1938); Report of Advisory Committee p. 45 (April, 1937); Sunderland, *The Theory and Practice of Pre-Trial Procedure*, 36 MICH. L. REV. 215 (Dec. 1937); 21 JOUR. AM. JUD. SOC, 125 (Dec. 1937). See also *Success of Pre-Trial Hearings Demonstrated*, 21 JOUR. AM. JUD. SOC. 160 (Feb. 1938); McDermott, *Just What Is Your Defense*, 18 JOUR. AM. JUD. SOC. 100 (1935); Mitchell, *Some Problems Confronting the Advisory Committee*, 23 A. B. A. J. 969 (Dec. 1937).

[61]Compare REM. REV. STAT. §§ 179 *et seq.* and equity rule 37.

[62]Rule 18. For an excellent statement by Dean Clark as to the desirability of this liberality as to joinder of claims and parties see Clark, *The Proposed Federal Rules of Civil Procedure*, 22 A. B. A. J. 447, 449 (July, 1936) and also 23 A. B. A. J. 976 (Dec. 1937) where he states that "this has been the universal trend of Anglo-Saxon procedural reform." See also Notes to Rules of Civil Procedure p. 19 (March, 1938), and Report of Advisory Committee p. 50 (April, 1937).

[63]Rule 18 (b). "This rule is inserted to make it clear that in a single action a party should be accorded all the relief to which he is entitled regardless of whether it is legal or equitable or both. This necessarily includes a deficiency judgment in foreclosure actions formerly provided for in equity rule 10." Notes to Rules of Civil Procedure p. 19.

[64]Rule 18 (b). This rule conforms to the provisions of The Uniform Fraudulent Conveyance Act, §§ 9 and 10. Notes to Rules of Civil Procedure p. 19. Our state practice is to the contrary. O'Day v. Ambaum, 47 Wash, 684, 92 Pac. 421, (1907); Allen v. Kane, 79 Wash. 248, 140 Pac. 534 (1914).

the court of jurisdiction. Subject to the same conditions, the court shall order added as parties those who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties.[65]

The rule as to permissive joinder of parties is substantially the same as in this state.[66] All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. (Rule 20(a)). A like rule applies to joinder of defendants. It is unnecessary that a plaintiff or defendant be interested in obtaining or defending against all of the relief demanded. Judgment may be given for or against one or more parties according to their respective rights or liabilities. The court may order separate trials or make other orders to prevent delay or prejudice.

Parties may be dropped or added by order of the court at any stage of the action and on such terms as are just.[67] Misjoinder of parties is not ground for dismissal of an action. Any claim against a party may be severed and proceeded with separately.

Interpleader proceedings are authorized, where the defendants' claims are such that the plaintiff may be exposed to double or multiple liability. It is no defense that their claims are adverse to and independent of one another, without a common origin, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim.[68]

Class actions affecting numerous persons may under certain circumstances be brought or defended by one or more persons on behalf of all.[69] Where a corporation refuses to sue and suit is brought by a stockholder the complaint must be verified and must contain certain allegations showing that the suit is not collusive to confer jurisdiction on a federal court. A class action cannot

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[65]Rule 19. See form 26. Compare REM. REV. STAT. §§ 189, 196, 308-2. See also Notes to Rules of Civil Procedure p. 20 (March, 1938); Report of Advisory Committee p. 54 (April, 1937).

[66]Rule 20. Compare REM. REV. STAT. § 308-2.

[67]Rule 21. Compare REM. REV. STAT. § 308-2.

[68]Rule 22. See forms 18 and 21. Compare REM. REV. STAT. §§ 198 to 201. See Notes to Rules of Civil Procedure p. 21 (March, 1938) and Report of Advisory Committee p. 55 (April, 1937).

[69]Rule 23. Compare REM. REV. STAT. § 190 and equity rule 38. See Notes to Rules of Civil Procedure p. 22 (March, 1938) and Report of Advisory Committee p. 58 (April, 1937).

be dismissed or compromised without the court's approval, and in certain cases, only after notice to all members of the class.

Intervention may be made as a matter of right when unconditionally authorized by federal statute, or when the representation of the intervenor's interest may be inadequate and he may be bound by the judgment, or when he may be adversely affected by disposition of property in the custody of the court. Moreover in the discretion of the court anyone may be permitted to intervene when his claim or defense and the main action have a question of law or fact in common.[70]

(To be continued)

[70]Rule 24. Compare REM. REV. STAT. §§ 202, 203, 308-2. See form 23 and Notes to Rules of Civil Procedure p. 24 (March, 1938); Report of Advisory Committee p. 62 (April, 1937).